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IN THE

Supreme Court of the United States

NOVEMBER TERM, 1961

JAQUE DURHAM, *Appellant.* v. CITY OF INDIANAPOLIS, *Appellee.*	No. 547
JANICE BONNER, *Appellant.* v. CITY OF INDIANAPOLIS, *Appellee.*	No. 546

APPELLEE'S MOTION TO DISMISS

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APPELLEE'S MOTION TO DISMISS

To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Appellants filed separately the two above-captioned appeals but since both of said appeals involve identical questions the Appellee files a single Motion to Dismiss under the suggested authority of Paragraph 3 of Rule 15.

In compliance with Rule 16 of the Supreme Court of the United States, the City of Indianapolis, Appellee herein, moves to dismiss the two above-captioned appeals.

To particularly disclose the grounds whereby Appellee contends Appellants have failed to invoke the jurisdiction of the Supreme Court of the United States on appeal, the Appellee states that Appellants apparently refer to United States Code Annotated, Title 28, Section 1257-2 as the basis of their appeals, but Appellants statement is not concise or clear as to the grounds on which the jurisdiction of the Supreme Court of the United States is invoked and is not in conformity to statute or the Court rules. No substantial Federal question is presented—nor is any Federal question shown as having been timely or properly raised or passed on; rather it is shown the judgment rests on an adequate non Federal basis, and that it is unsubstantial and frivolous. Said appeal is lacking in the following particulars:

1. The Appellants fail to refer distinctly:

   (a) To the statutory provision believed to sustain the jurisdiction.

   (b) To the Statute of the State of Indiana, the validity of which is involved and the page and volume where the same may be found and setting out the same verbatim or by appropriate summary.

2. The Appellants statement does not disclose any grounds upon which it is contended that the questions involved are substantial. The record discloses merely that each Appellant was found guilty of the violation of a City Ordinance for operating a dive and was in the first case sentenced to 90 days and fined $250 and in the second fined $200.00; such questions not being so substantial as to invoke

the jurisdiction of the Supreme Court of the United States, it having been many times held that such Ordinances are within the proper police power of local government units.

3. This appeal is from the Supreme Court of the State of Indiana and the statement does not specify the first instance where the Federal questions were raised; nor does it disclose the method by which they were raised; nor the manner in which they were passed upon by the Court; pertinent quotations of specific portions of the record or a summary thereof with reference to the record as to their location are wholly absent; entirely missing also, is any assertion that the rulings of the Court were of a nature to bring the case within the statutory provision believed to confer jurisdiction on this Court.

4. The judgment rests on an adequate non-Federal basis.

To enlarge upon the specific listed and numbered points wherein Appellee contends Appellants' appeals fail to present Supreme Court jurisdiction, Appellant submits the following contentions and authorities.

I.

(a-b) Appellants' Jurisdictional Statement states that in each such instance they appeal on the basis of the validity of a Statute (here an Ordinance) as held by the Supreme Court of Indiana on the basis of its repugnancy to Federal Constitution and laws, citing 62 Stat. 929, 1257 (2d) U.S.C.A., Title 28.

No adequate presentation of such a contention is within the Appellants' jurisdictional statement which seems instead to take another track. However, neither the pleadings in the trial Court nor the assignment of errors, nor the opinion of the Supreme Court of Indiana contain any refer-

ence as to how the Indianapolis City Ordinance set out in the jurisdictional statements is violative of any Federal Constitutional or statutory provision, and accordingly there is color for a motion to dismiss.

East Tennessee V & G Ry. Co. v. Frazier, Tenn. (1891), 11 S. Ct. 517, 139 U. S. 288, 35 L. Ed. 196.

II.

The question that the Indianapolis City Ordinance involves the keeping, operating or visiting of a dive is practically completely abandoned by Appellants in their jurisdictional statements. Even if they had completely outlined and pointed out distinctly in what manner they claimed such an Ordinance was violative of Federal Statutes or of the United States Constitution they would even then have presented no substantial question to the Supreme Court of the United States.

This Court has long ago disposed of such questions by holding that local laws pertaining to the suppression of bawdy houses, pool rooms and the like, in order to preserve the morals and welfare of a local community and in the proper exercise of the local police power, is violative of no Federal law or prerogative, nor of any Federal Constitutional provision. Accordingly no substantial question is presented by the appeal of the two Appellants.

Murphy v. People of California (Cal.), 32 S. Ct. 697, 225 U. S. 623, 56 L. Ed. 1229.

III.

The jurisdictional statement of each of the Appellants does not, at any time, specify where the question of the Federal violation of the City Ordinance was first raised with

quotations from the specific portions of the record. The jurisdictional statement is completely violative of Subsections "C" and "D" of Rule 15. Indeed, the statements are each so lacking that they set out nothing of a nature to bring their appeals within any statutory provision which would confer jurisdiction on the Supreme Court of the United States.

Appellants in each of the appeals abandon their original ground of appeal and state that the Federal question they rely on is the due process of law clause of the 14th Amendment and they do this on the basis that the counsel for each of the Appellants failed in that he did not in each of said appeals complete a timely appeal to the Supreme Court of Indiana on the basis that each of the Appellants were involved in a major crime and were denied proper legal representation.

Apart, however, from the fact that no appeal was completed, nothing else is raised in the jurisdictional statement of each of the Appellants.

The record in the Durham case filed in the Supreme Court of Indiana discloses that each of the Appellants were at various times operating the dive complained of. Both liquor and contraceptives were found on the property. Record Durham case page 20, lines 10 to 20, page 11, line 14.

A proper search warrant was used before the entry by the police officers. Record outset Bill of Exceptions, Durham case.

The record clearly shows that the Appellants as defendants in the Nisi Prius Courts were adequately, skillfully, and vigorously defended and that their rights and their defenses were properly and timely presented. It would appear from the record that these defendants had little to

appeal from and scant chance of reversing the finding of the lower Court on appeal.

It is only in major or capital crime cases that the Federal Constitution requires a defendant to have adequate counsel. In Indiana, violations of Ordinances are not even minor crimes. They are regarded as part of the civil procedure of the State and the applicable requirements of adequate legal representation as in the case of major criminal charges would not apply.

Seibert v. Evansville, 195 Ind. 189, 144 N. E. 841;
Shea v. Muncie, 148 Ind. 14, 33, 46 N. E. 138;
Brookville v. Gagle, 73 Ind. 117;
Greensburg v. Corwin, 58 Ind. 518;
Quigley v. Aurora, 50 Ind. 28;
Tippecanoe County v. Chissom, 7 Ind. 638;
Indianapolis v. Fairchild, 1 Ind. 315;
Hammond v. New York, C. & St. L. Ry. Co., 5 Ind. App. 526, 31 N. E. 817.

Even assuming that the Ordinance violation were quasi-criminal where the defendant had adequate representation in the trial Court and then merely failed to complete an appeal, such an appeal is not a part of the criminal procedure and where such defendants were given an adequate trial and the right of appeal, they were accorded due process of law by the Indiana Courts and cannot complain and accordingly there is no Federal question presented by the jurisdictional statement of each of the Appellants.

State ex rel. Burkheimer v. Adams (W. Va., 1958), — W. Va. —, 103 S. E. (2d) 777, Cert. Denied 358 U. S. 869, 3 L. Ed. (2d) 101, 79 S. Ct. 102 and Annotation 74 A.L.R. (2d) Note 15—Failure of counsel on appeal, p. 1457.

IV.

The judgment rests on an adequate non-Federal basis.

A final analysis of the appeal of each of the defendants below, found guilty of Ordinance violation, part of the civil procedure of Indiana, is that their counsel did not complete an appeal in the Supreme Court of Indiana. By failure so to do the Indiana Supreme Court did not pass on the Ordinance or decide any question which violated any Federal Statute or any Federal Constitutional provision. It made no determination of the fact that the Indianapolis City Ordinance of keeping or maintaining a dive was violative or not violative of any Federal Statute or Constitutional provision. Under these circumstances the case as it comes up from Indiana to the Supreme Court of the United States stands on an adequate non-Federal procedural basis and presents nothing which would give the Supreme Court of the United States jurisdiction.

CONCLUSION

Plainly and obviously the appeal of each of the Appellants is not taken in conformity to Statute or to the rules of the United States Supreme Court, and certainly no substantial Federal question is presented and no Federal question is shown to have been timely or properly raised or expressly passed on, but rather that the judgments in Indiana rest on an adequate non-Federal basis.

It is apparent that the Appellants in each of the appeals are trying to get a new trial of an unsatisfactory result in the State case before the Supreme Court of the United States, and that the action simply delays and sets back the enforcement of the judgment of Ordinance violation in the Circuit Court in Marion County at Indianapolis, Indiana.

and that the whole appeal is without substantial basis and is frivolous and in such an instance ought not to be accepted by the Supreme Court of the United States as to either Appellant.

John v. Paulin (Okla., 1913), 34 S. Ct. 178, 231 U. S. 583, 58 L. Ed. 381;

Smith v. Adsit (Ill., 1873), 16 Wall. 185, 21 L. Ed. 310;

Charles Thomas v. State of Iowa (Ia., 1897), 209 U. S. 258, 52 L. Ed. 782.

The Appellee in each of the above-captioned appeals respectfully therefore moves the Court to dismiss each of such appeals.

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